

H2dnorlc

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 CARL ORLANDO, JR., on behalf  
5 of himself and others  
6 similarly situated, et al.,

7 Plaintiffs,

8 v.

15 Civ. 9434 (RJS)

9 LIBERTY ASHES, INC.; FRANCESCO  
10 BELLINO; MICHAEL BELLINO, JR.;  
11 STEPHEN BELLINO; and MICHAEL  
12 BELLINO,

13 Defendants.

14 -----x  
15 New York, N.Y.  
16 February 13, 2016  
17 2:30 p.m.

18 Before:

19 HON. RICHARD J. SULLIVAN,

20 District Judge

21 APPEARANCES

22 JOSEPH & KIRSCHENBAUM, LLP  
23 Attorneys for Plaintiffs  
24 BY: DENISE A. SCHULMAN  
25 -and-  
FINN W. DUSENBERY

TRIVELLA & FORTE LLP  
Attorneys for Defendants  
BY: CHRISTOPHER A. SMITH  
ARTHUR J. MULLER III

H2dnorlc

1 (Case called)

2 THE COURT: Let me take appearances.

3 For the plaintiff?

4 MS. SCHULMAN: Good afternoon, your Honor Denise  
5 Schulman and Finn Dusenberry.

6 THE COURT: Ms. Schulman, good afternoon.

7 And with you at counsel table?

8 MR. DUSENBERRY: Finn Dusenberry, your Honor.

9 THE COURT: Mr. Dusenberry.

10 Mr. Kirschenbaum couldn't be bothered or he's just not  
11 up to it?

12 MS. SCHULMAN: Not available.

13 THE COURT: You are better off without him.

14 For the defendant?

15 MR. SMITH: Yes, good afternoon, your Honor,  
16 Christopher Smith.

17 THE COURT: Mr. Smith, good afternoon.

18 MR. MULLER: Arthur Muller, your Honor.

19 THE COURT: Mr. Muller, good afternoon to you.

20 We are here on defendants' contemplated motion.

21 Mr. Muller, are you on the docket sheet?

22 MR. MULLER: Yes, it was filed today.

23 It's docket No. 95.

24 THE COURT: I print these out the Friday before, so  
25 that accounts for it.

H2dnorlc

1 OK. So we are here on defendants' contemplated motion  
2 to dismiss or to compel arbitration and then dismiss based on a  
3 collective bargaining agreement that was negotiated and  
4 executed after the plaintiffs had ceased to be employed by the  
5 defendants. Correct?

6 There's no dispute on those facts, right?

7 MR. SMITH: I think that's true, yes.

8 THE COURT: Then the question is whether or not the  
9 plaintiffs would be bound by this later negotiated and executed  
10 document.

11 So, I haven't found anything exactly on point. I  
12 think the case cited by defendants is not really on point, that  
13 Judge Forrest opinion. I mean, unless I'm missing something,  
14 it seems to me that those are folks who are still employees,  
15 those plaintiffs, but there was a modification to a collective  
16 bargaining agreement or a modification to an agreement that  
17 covered previously accrued claims, but they were still  
18 employed, is that fair?

19 MR. SMITH: So the complaint -- and I cited it in my  
20 reply letter -- the complaint is for the present and former  
21 employees in the *Lai Chan* case, and my understanding --

22 THE COURT: There were no former employees among the  
23 named plaintiffs, right?

24 I don't think it was a collective action, I don't  
25 think.

H2dnorlc

1 MR. SMITH: There were no former employees. I am not  
2 sure of that.

3 THE COURT: It seems to me at least counterintuitive  
4 that an employer and current employees through their union  
5 would be able to negotiate away rights of former employees who  
6 weren't involved in the process.

7 But stranger things I guess have happened. I haven't  
8 found any precedent that is right on point for this. Is there  
9 any reason to believe that the plaintiffs here -- are they  
10 still members of the union? Do we know?

11 MR. SMITH: If they are former employees -- I don't  
12 know. I don't know. I could find that out. I doubt it.

13 THE COURT: I doubt it, too. But I can imagine if  
14 that were the case maybe there is an argument that the  
15 collective bargaining unit that is engaging in the negotiations  
16 is binding them as well as current employees. But it does seem  
17 a little counterintuitive to think that employees who have  
18 already commenced a suit would now have to pull the plug on  
19 their suit because actors in 2016 or later have now negotiated  
20 away their right to proceed in court.

21 You seem to think strongly that they are, in fact,  
22 subject to this kind of resolution. Maybe I am missing it,  
23 Mr. Smith, so tell me.

24 I mean, you have Judge Forrest's case in the -- I am  
25 not sure if I'm pronouncing it right the *Lai Chan v. Chinese*

H2dnorlc

1 *American Planning Council Home Attendant Program, Inc.* case.

2 That strikes me as a little different than the facts here. So  
3 go ahead.

4 MR. SMITH: Yes.

5 So I don't think the Court has to even reach that  
6 issue at this juncture. I think that as a federal court  
7 sitting and interpreting whether or not a matter should be  
8 compelled to arbitration, I think the case law, the  
9 *Cogeneration* case the *Arrigo* Second Circuit case all say,  
10 absent a temporal limitation in the arbitration clause, where  
11 the Court can say with positive assurance that the matters are  
12 not susceptible --

13 THE COURT: I'm sorry to interrupt you, but it seems  
14 to me this is all based on consent. If the parties have  
15 consented to arbitrate, then, by God, they are going to have to  
16 arbitrate. That is just the way it goes.

17 If the plaintiffs here were not involved in the  
18 collective bargaining action that resulted in the post facto  
19 arbitration provision, how have they consented?

20 MR. SMITH: It is interesting. In the *Lai Chan* case  
21 and also in the case cited in *Lai Chan*, *Duraku v. Tishman*  
22 *Speyer Properties, Inc.*, 714 F.Supp.2d 470, you have  
23 individuals who have actually filed litigation. The  
24 presumption is they are not consenting to arbitration and  
25 they're pursuing their supposed legal remedy in court.

H2dnorlc

1           Yet, despite the fact that they have actually filed  
2           for litigation, the Court -- and in the *Duraku* case the SEIU  
3           amended the collective bargaining agreement to include -- in  
4           that case it was a different type of federal law. It was a  
5           discrimination case, but amended it to include that as part of  
6           the duty to arbitrate. The Court said no, even though you have  
7           actually filed a litigation, which probably could be construed  
8           to be the something where somebody has not consented to  
9           arbitration, if they had consented, they would have filed a  
10          grievance, you still have to go to arbitration because we can't  
11          say with positive assurance that the clause that's been  
12          negotiated here by the SEIU -- and they are talking about the  
13          clause that was negotiated after the parties in *Duraku* filed  
14          for litigation, that that clause is not susceptible to  
15          interpretation of a recovery of wages claims.

16                THE COURT: Again, I don't think you are addressing  
17          the consent point.

18                How did the former employees consent to a provision  
19          that was negotiated after they ceased to be employees?

20                MR. SMITH: I don't think there is any dispute that  
21          the employees at all relevant times were members of this union  
22          when they worked for Liberty, and that there was a collective  
23          bargaining agreement between the parties that contained a broad  
24          arbitration clause.

25                THE COURT: We will get to that in a minute.

H2dnorlc

1           It seems to me there are a couple of different  
2       agreements, and I don't have them all. I only have I guess  
3       your characterization of the most recent one and then an  
4       attachment, and then another that was in effect I guess between  
5       2015 and 2016 I think.

6           Is that right?

7           MR. SMITH: Well, it's my understanding that at all  
8       relevant times there's been a collective bargaining agreement  
9       in place.

10          THE COURT: But I don't have the one that was in place  
11       at the time of the alleged violations I don't think. But, in  
12       any event, I think the real crucial issue is what is it that  
13       would allow a union to negotiate away the rights of people who  
14       are no longer in the union?

15          MR. SMITH: I think the fact that they were the  
16       exclusive bargaining representative under Section 9 of the  
17       National Labor Relations Act at the time that these individuals  
18       worked. I think that contractual rights, particularly rights  
19       that are collectively bargained, are not normally vested. The  
20       same party that negotiated them in the first place can  
21       negotiate them retroactively to be changed.

22          So, for instance, in the *Luden's* case that I cited to  
23       the Court in my reply letter, the court there forced the  
24       parties to arbitrate an issue of retroactive wages. Unions do  
25       things retroactively for employees all the time. They may

H2dnorlc

1 provide for a retroactive wage increase.

2 I don't think in that context even former employees  
3 won't be able to say, you know, I should have gotten more than  
4 what the union negotiated for me in terms of --

5 THE COURT: You think they could negotiate a  
6 retroactive wage decrease?

7 MR. SMITH: I don't have case law in front of me to  
8 say that, but I think they could -- to the extent that the  
9 person who already earned the wages, I don't think they would  
10 be able to do that, but I think in terms of their venue, their  
11 choice of law or the venue, whether they go to arbitration  
12 versus they litigate the claims, I certainly think that they  
13 can do that.

14 At the time that these employees worked for Liberty,  
15 they had the union as their representative. They agreed that  
16 the union could negotiate all the mandatory subjects in  
17 bargaining, which include an arbitration clause.

18 The union in fact did negotiate a broad arbitration  
19 clause for them. I think that the union as a party to the  
20 agreement certainly has the right to negotiate something which  
21 may or may not retroactive effect.

22 THE COURT: What do you mean may or may not have  
23 retroactive effect?

24 MR. SMITH: I think the issue of what the  
25 interpretation of that clause and the rest of the collective



H2dnorlc

1 bargaining agreement is, is for the arbitrator. I think since  
2 there is no temporal limitation in the arbitration clause that  
3 was negotiated in December of 2016 and the court can't say with  
4 positive assurance that these people aren't covered by it, that  
5 they should at least in the first instance refer to the  
6 arbitrator to decide that issue. And the former employees  
7 wouldn't be left without a remedy.

8 Obviously if an arbitrator makes a ruling and somehow  
9 engages in a manifest disregard of law, there is a legal remedy  
10 for that, because there is a strong presumption of  
11 arbitrability, and because the Second Circuit in the  
12 *Cogeneration* case that I cited states that any matters that --  
13 anything that touches matters covered by the agreement must be  
14 arbitrated. The "touches matters" is from the *Cogeneration*  
15 case -- that the Court should find that this is susceptible to  
16 an interpretation that applies to the former employees and  
17 should in the first instance order the whole dispute to  
18 arbitration and perhaps review whatever the arbitrator decides  
19 later on.

20 THE COURT: Except that generally the Court's first  
21 inquiry is to whether or not there is an enforceable -- I guess  
22 there is an arbitration clause between the parties, right? So  
23 there's no dispute that the plaintiffs in this case didn't  
24 negotiate anything regarding an arbitration clause, right?

25 MR. SMITH: I think when the Court says between the

H2dnorlc

1 parties --

2 THE COURT: I've got named plaintiffs: Mr. Orlando,  
3 Mr. Menna, Acevedo, Powell, Persad. Those are the named  
4 plaintiffs at this point. None of them -- it's not a situation  
5 where they signed an arbitration clause or an arbitration  
6 agreement, right?

7 MR. SMITH: No. But here between the parties would be  
8 the employer and the union.

9 THE COURT: Well, I guess that's the point. But I  
10 think the consent has to be with these plaintiffs, right?

11 You are saying that, well, these plaintiffs are  
12 represented by the union, and so they are bound by the union.  
13 I am just not sure whether that is true after they have ceased  
14 to be in the union.

15 I haven't found much in the way of case law on this,  
16 but I think the analogy would be if the union negotiated a wage  
17 decrease, that back pay will now be reduced 50 percent in  
18 exchange for some future benefits, would these plaintiffs be  
19 bound by that?

20 MR. SMITH: I never like hypotheticals, your Honor. I  
21 would say, since we are talking specifically about arbitration,  
22 and because there is a strong presumption of arbitrability, I  
23 think the Steelworkers' trilogy and the *Cogeneration* case --

24 THE COURT: I don't think there is a strong  
25 presumption of arbitrability no matter what. The first inquiry

H2dnorlc

1 is whether or not there is an agreement, whether the folks have  
2 entered into an agreement, right?

3 MR. SMITH: When you say the folks --

4 THE COURT: The parties.

5 I'm dealing with the parties here. I am not a labor  
6 negotiator. This is a case between plaintiffs and the  
7 defendants.

8 You are saying that the plaintiffs have agreed to  
9 arbitrate, and their response is, We didn't agree to anything.  
10 We ceased to be employed by these guys, and then we brought  
11 suit. And now, after suit was brought, the union has  
12 negotiated away our ability to prosecute our case.

13 MR. SMITH: This isn't a case like the case that is  
14 before you, your Honor, the *Daly v. Citigroup* case, where  
15 you've got individuals bound by FINRA. This is more akin to an  
16 entity who has, through labor law, delegated the whole  
17 responsibility to bargain on their behalf to an exclusive  
18 bargaining representative.

19 THE COURT: I agree with you, but I haven't seen  
20 anything to suggest that that delegation continues even after  
21 they have ceased to work there.

22 MR. SMITH: I think the *Arrigo* case, the Second  
23 Circuit case is on point in that, your Honor, in terms of that  
24 is a Fair Labor Standards Act case where the Second Circuit  
25 held arbitration.

H2dnorlc

1           In the *Lai Chan* case the Court cites *Arrigo*. I am  
2 just reading right now from the *Lai Chan* case: "Plaintiffs  
3 seek to avoid this mandatory arbitration clause by arguing that  
4 the agreement to arbitrate embodied in the 2015 MOA cannot  
5 apply retroactively to claims that may have accrued prior to  
6 the execution of the 2015 MOA. This argument is meritless.  
7 The Second Circuit has indicated that, in the absence of a  
8 provision placing a temporal limitation on arbitrability, an  
9 arbitration provision may cover claims that accrued prior to  
10 the execution of the agreement to arbitrate."

11           THE COURT: I guess there's no question that it's  
12 still the same plaintiffs. Where the plaintiffs have been  
13 employed and continued to be employed at the time of the  
14 amendment, that's sort of different than where somebody ceases  
15 to be employed by the union, I mean employed and therefore not  
16 subject to the union. If they are not members of the union,  
17 how is the union representing them at this point?

18           MR. SMITH: I don't know if they are members or not.  
19 But assuming *arguendo* they are not, I think, just like in *Lai*  
20 *Chan*, where there were former employees, the Court referred the  
21 entire matter to arbitration in the first instance. So those  
22 former employees in *Lai Chan* presumably were not represented by  
23 any labor organization, and yet *Lai Chan* found, because the  
24 presumption of arbitrability is so strong and because the Court  
25 can't state with positive assurance that the matter is not

H2dnorlc

1 susceptible to arbitration, that they would err on the side of  
2 at least referring it to the arbitrator in the first instance  
3 to let the arbitrator decide, does this cover current  
4 employees, does this cover former employees, what is the scope  
5 of the collective bargaining agreement. I think the scope of  
6 the agreement has certainly -- that is not a gateway to kind of  
7 an issue for the Court to decide in the first instance.

8 THE COURT: Why do you say that?

9 I mean, this is the Second Circuit quoted by Judge  
10 Forrest in the *Lai Chan* case: "To the extent there is doubt  
11 about the scope of arbitral issues, the Court must resolve the  
12 doubt in favor of arbitration. But while a gateway dispute  
13 about whether the parties are bound to a given arbitration  
14 clause raises a question of arbitrability for a Court to  
15 decide, it is the role of the arbitrator rather than this Court  
16 to resolve issues of contract interpretation in arbitration  
17 procedures in the first instance."

18 This strikes me as the gateway question for sure.  
19 This is whether or not these plaintiffs are bound by the  
20 arbitration clause.

21 MR. SMITH: I respectfully say no. I don't think it's  
22 whether these entities -- I think once the Court establishes  
23 that the union and the employer have agreed to arbitrate these  
24 claims, and that the claims, at least the arbitration clause is  
25 open to interpretation, that the scope of the arbitration

H2dnorlc

1 clause encompasses wage claims.

2 Here I don't think you can reach any other conclusion,  
3 because the instant memorandum of understanding -- the  
4 memorandum of agreement says any claim, so it's not limited in  
5 time.

6 Then I think the Court in the first instance should be  
7 satisfied that there is an agreement to arbitrate, refer it to  
8 the arbitrator to interpret the contract and to interpret its  
9 retroactivity.

10 THE COURT: All right. Let me hear from --  
11 Ms. Schulman, are you carrying the ball for your team?

12 MS. SCHULMAN: Yes, your Honor.

13 THE COURT: I don't think this is a crazy argument. I  
14 just haven't found a lot of authority one way or the other for  
15 it. It seems counterintuitive to me.

16 Is there some authority that suggests that in fact  
17 Mr. Smith is wrong?

18 MS. SCHULMAN: There is no authority addressing this  
19 precise issue.

20 THE COURT: I'm surprised not. You would concede at  
21 this point that any member of the potential collective or class  
22 who is still employed by Liberty Ashes and represented by the  
23 union can't be proceeding in this action?

24 MS. SCHULMAN: Most likely, unless we can find some  
25 other basis to invalidate the arbitration clause.

H2dnorlc

1 THE COURT: OK. So we are only talking then about the  
2 named plaintiffs who you tell me are all former employees?

3 MS. SCHULMAN: Right.

4 THE COURT: And anybody else I guess who is a former  
5 employee who ceased working for defendants prior to the  
6 amendment?

7 MS. SCHULMAN: Right.

8 Although right now we really only have to talk about  
9 the five plaintiffs, since it's not been certified as a --

10 THE COURT: I get that. Depending on how we resolve  
11 this one, we might be in that world pretty quickly.

12 MS. SCHULMAN: Right.

13 THE COURT: So if the union had negotiated back pay  
14 increases, wouldn't these former employees be bound by that  
15 negotiation?

16 MS. SCHULMAN: Meaning that they might benefit from  
17 that?

18 THE COURT: They might benefit, but they would also be  
19 limited to it.

20 MS. SCHULMAN: The difference between that and what we  
21 have here is when you are talking about back pay potentially  
22 going to former employees or being excluded from back pay, you  
23 are talking about an obligation that the employer has to the  
24 employees.

25 What we have here is defendants, and the union, which

H2dnorlc

1 does not represent our clients at this time, trying to impose a  
2 duty on them, something that the plaintiffs have to do, not an  
3 obligation of the employer to them. It is just sort of  
4 baffling how, when we are talking about a matter of contract, a  
5 union that does not represent these people can bind them to  
6 take some particular action.

7 They don't have representative capacity at this point  
8 because --

9 THE COURT: What is the authority for saying that,  
10 that they don't have a representative capacity?

11 MS. SCHULMAN: First it's pretty well settled that a  
12 union does not owe a duty of fair representation to former  
13 employees. That's because they are not part of the bargaining  
14 unit. The union is not the exclusive representative of former  
15 employees.

16 THE COURT: You are citing authority? Are there  
17 cases --

18 MS. SCHULMAN: There are cases. I believe I cited an  
19 Eighth Circuit case in my letter *McCormick v. Aircraft*  
20 *Mechanics Fraternal Organization*. But it comes up a lot also  
21 in the pension context. That's probably the most common area,  
22 where the cases deal with former employees, that the union does  
23 not owe the former employees that duty.

24 I would just like to point out with the -- in terms of  
25 the different CBAs that are at issue here, defendants provided



H2dnorlc

1 a CBA with their reply letter with an effective date from  
2 January 1, 2012 to December 31, 2015. That is a CBA that  
3 covers at least part of the time period that the plaintiffs  
4 worked for defendants. But the memorandum of agreement, which  
5 is dated December 28 of last year, says explicitly that it  
6 amends a collective bargaining agreement effective from January  
7 1, 2016 to December 31, 2018. That is a whole different CBA,  
8 our clients never worked under it. So the MOA is amending a  
9 CBA that itself postdates my client's employment.

10 THE COURT: I get that. I want to come to that in a  
11 minute.

12 Right now I'm just trying to get my head around the  
13 notion that the union represents former employees for some  
14 purposes but not other purposes.

15 MS. SCHULMAN: As I understand it, they can -- I don't  
16 want to -- it's murky. But I have seen no case that permits a  
17 union to impose an obligation on former employees. I think the  
18 idea is that, after an employee has left, a union is  
19 negotiating a whole constellation of financial terms. That  
20 could include back pay, that could include pension payments.  
21 So those things may necessarily impact former employees, but  
22 they are not binding those former employees to anything  
23 themselves.

24 THE COURT: Other than this Eighth Circuit case,  
25 *McCormick*, is there any other authority? Either cases or

H2dnorlc

1 opinions from the Department of Labor anything like that?

2 MS. SCHULMAN: I am sure I could provide others that  
3 stand for the proposition that the union is not the  
4 representative of the former employees. I think I could do  
5 that.

6 THE COURT: OK. I think that's worth doing. I don't  
7 think there is a tremendous amount out there, but this is  
8 pretty central to resolving the issue.

9 I am hopeful that it has come up, or at least  
10 something analogous has come up in other cases or in labor  
11 department opinions.

12 Are you aware of anything else, Mr. Smith?

13 MR. SMITH: I can cite the case law, but unions all  
14 the time represent employees who have been wrongfully  
15 terminated, so their employment ceased at that point. I think  
16 there is a case, *Noldi Brothers* (phonetic) where they were  
17 representing individuals with respect to severance pay where  
18 the entire collective bargaining agreement had expired and the  
19 employer was making the argument that -- there is a case called  
20 *Advanced Lightweight Concrete* which says that postcontract  
21 expiration disputes are solely within the jurisdiction of the  
22 National Labor Relations Board. So the union very often, even  
23 after the contract has expired, can represent employees in the  
24 collective --

25 THE COURT: The fact that it's expired doesn't mean

H2dnorlc

1 that the union is not the collective bargaining representative  
2 of everybody who is a worker or would-be worker.

3 I think the issue is, for former workers, can the  
4 union negotiate away their rights?

5 So could the union say -- I mean, this is the example  
6 I used before -- but in negotiating its next collective  
7 bargaining agreement say, And also any overtime that is owed  
8 for the past five years for former employees, there's no longer  
9 a liability for that.

10 They couldn't do that, right?

11 MR. SMITH: I think that the fact that they were  
12 former employees is kind of a red herring, because I think we  
13 can concede that any wage claim that these individuals might  
14 have accrued at the time that they were represented by the  
15 union.

16 So it's just a question of the union -- A, do they  
17 have to process any wage grievance through the collective  
18 bargaining/arbitration process, or are they allowed to,  
19 notwithstanding that there is a collective bargaining agreement  
20 that the parties have specifically agreed to a broad  
21 arbitration clause clearly covering causes of action in this  
22 litigation and without any temporal limitation, whether,  
23 notwithstanding all of that, the employees can stand up on  
24 their own, and notwithstanding Section 9 of the National Labor  
25 Relations Act, stand up on their own and say, well, I am not

H2dnorlc

1 satisfied with the way the union is handling this, so I'm just  
2 going to file my own claim.

3 That would defeat the whole purpose of arbitration in  
4 the collective bargaining context. From the Steelworkers  
5 trilogy on there was always maintained a piece of labor  
6 relations that you have this strong presumption.

7 I think it is an easier job for the Court in terms of  
8 you don't have to get into all of that. You can refer it to  
9 the arbitrator in the first instance. I think the Second  
10 Circuit mandates that. Then, whatever the arbitrator -- if the  
11 arbitrator acts *ultra vires* or if there is a manifest disregard  
12 of the law in his award, there's obviously judicial relief in  
13 that instance.

14 But to just say, well, employees can step forward  
15 notwithstanding what the parties to the arbitration agreement  
16 have agreed to, particularly where, as here, the entity at the  
17 time of the wage claim accrued was their exclusive collective  
18 bargaining representative, I don't think that's consonant with  
19 the law.

20 THE COURT: Isn't there a concern that the collective  
21 bargaining unit will negotiate away the rights of former  
22 members to benefit current members?

23 MR. SMITH: The collective bargaining representative  
24 negotiates on behalf of the bargaining unit. That unit is a  
25 dynamic entity. It is not a static entity. So, over the

H2dnorlc

1 course of time, people may come in and out, but the union is  
2 constantly negotiating for that bargaining unit. People with  
3 common interest, a commonality of interest agree to this  
4 representation process, and Section 9 of NLRA provides for all  
5 that.

6 Yes, I think they do -- at the time that they are  
7 negotiating -- they are not just -- they don't have blinders on  
8 for negotiation. It is just for that particular moment in time  
9 they are negotiating for issues that may have arisen in the  
10 past, and they're also negotiating prospectively, because  
11 contracts sort of -- they're negotiating for people who haven't  
12 even become employees yet with the company.

13 THE COURT: Here's a different hypothetical.

14 Then can a union basically negotiate away the pension  
15 rights of former employees to benefit current employees?

16 MR. SMITH: That is a little bit different.

17 THE COURT: I think there are different statutes and  
18 regs that cover a lot of these things.

19 MR. SMITH: You have a bit of a conflict I think  
20 between ERISA and -- particularly, the anti-alienation  
21 provision of ERISA, Section 411(d)(6), which says that you  
22 can't cut back on an employee's benefits. So if I was somebody  
23 with a pension -- although it does happen I believe in the  
24 bankruptcy context where you have Section 1113 proceedings  
25 where these rights are negotiated away. I think the *Delta*

H2dnorlc

1 *Pilots* case comes to mind.

2 THE COURT: That's through bankruptcy, right?

3 That is a different animal.

4 MR. SMITH: I am just saying the union has the power  
5 to negotiate -- I think your question was, Does the union have  
6 the power to negotiate that, if I had a vested -- and, yes, I  
7 think --

8 THE COURT: Again, only if a court approves it.

9 MR. SMITH: I think if your pension wasn't vested yet,  
10 yes, I think the union may have the ability to negotiate that  
11 away.

12 Once you vested in the pension, my understanding is  
13 that 411(d)(6) and the anti-alienation provisions of ERISA  
14 don't allow vesting rights to be undone. But there you've got  
15 a conflict of federal laws that really doesn't exist here.  
16 This is pretty straightforward actually.

17 THE COURT: I am not sure how straightforward this is.  
18 I think it is an interesting issue, but I haven't seen a lot of  
19 authority that addresses this specific factual situation.

20 MR. DUSENBERRY: Your Honor --

21 MR. SMITH: It is dynamic. It's in flux now. We've  
22 Judge Gorsuch on the Supreme Court. It was supposed to be  
23 handled in this term. It is going to be moved to the next  
24 term. I am sure we will hear more from the appellate courts  
25 and the Supreme Court on this whole issue.

H2dnorlc

1 THE COURT: I think some of the facts are different on  
2 those other issues.

3 Did you want to say something Mr. Dusenberry.

4 MR. DUSENBERRY: I think it is a straightforward issue  
5 in the plaintiff's favor, your Honor. He's listed a bunch of  
6 cases that he cited that talk about the principle of  
7 retroactivity that have nothing to with this case. The  
8 collective bargaining agreement that the plaintiffs were under  
9 is a different collective bargaining agreement than the one  
10 that was issue here. That was modified.

11 THE COURT: No question about that.

12 What prevents the collective bargaining unit, which is  
13 the union, from negotiating on behalf of current and former  
14 members with respect to things like arbitration?

15 MR. DUSENBERRY: With respect to the former members  
16 who were under the previous CBA, that CBA no longer exists, so  
17 the union doesn't have authority to negotiate.

18 THE COURT: Why do you say that?

19 Why do they not have the authority to do that?

20 MR. DUSENBERRY: Because there is no CBA that is in  
21 effect for them anymore. That CBA has expired. There is a new  
22 CBA.

23 THE COURT: Right. I guess that's the point.

24 The new CBA basically says that it replaces and  
25 supersedes all prior ones, right?

H2dnorlc

1 MR. DUSENBERRY: Yeah. And the MOA, which contains  
2 the arbitration provision at issue here, modifies the new CBA,  
3 not the old one that the plaintiffs here were under.

4 THE COURT: Again, that's a different factual question  
5 that I was going to save for a minute. But I'm asking more in  
6 the straight legal question, which is, is there anything that  
7 would prevent -- so, imagine a hypothetical where we've got the  
8 CBA that involves your clients. They get terminated or quit,  
9 and then the collective bargaining agreement that they lived  
10 under has been renegotiated or amended after the fact by the  
11 union.

12 What is it that you would rely on to say they can't do  
13 that and bind the former employees?

14 MR. DUSENBERRY: Well, that they are not in the  
15 bargaining unit after they leave the CBA. I think that the  
16 terms of the CBA may affect that question.

17 THE COURT: Is there anything in the terms of the CBA  
18 that only binds people who are currently employed and members  
19 of the union?

20 MR. DUSENBERRY: Having looked at the MOA, I think  
21 that the MOA which has the arbitration provision applies only  
22 to current employees.

23 MS. SCHULMAN: Your Honor, if I could just --

24 THE COURT: You are talking about what is attached to  
25 the February 6 letter?



H2dnorlc

MR. DUSENBERRY: I believe so, your Honor.

MS. SCHULMAN: The CBA that is attached to the February 6 letter is the CBA that covered the period of our clients' employment, and it says, "This agreement shall apply to all present and future employees covered by this agreement and employed by the company during the term of" --

THE COURT: Where are you referring to?

MS. SCHULMAN: It is on page 3.

THE COURT: Right.

MS. SCHULMAN: It is right above union security.

THE COURT: "All present and future employees covered by this agreement."

MS. SCHULMAN: Right.

So we don't have the 2016 CBA, which is the one that was actually modified by the MOA, but presumably it has that same language in it.

THE COURT: So what is the date on this one?

MS. SCHULMAN: It is effective --

MR. DUSENBERRY: December 1, '16.

MS. SCHULMAN: No.

THE COURT: 2012?

MS. SCHULMAN: Yes, 2012.

It was signed January 1, 2012.

THE COURT: OK. Yes, that's the one I've got.

I don't have the intervening one.

H2dnorlc

1 I do have then the MOA, right?

2 MS. SCHULMAN: Right.

3 MR. DUSENBERRY: Correct.

4 THE COURT: I guess it would be good to have it.

5 Does anybody have it with them?

6 MR. DUSENBERRY: Do you have the --

7 THE COURT: Mr. Smith?

8 MR. SMITH: Which one are we looking at? The 2016-19?

9 THE COURT: I have the 2012 one. I don't know when it  
10 expires. 2015 or something.

11 MS. SCHULMAN: Yes. December 31, '15.

12 THE COURT: Then there's 2015 to 2016, right?

13 MS. SCHULMAN: No, the CBA with the February 6 letter  
14 expires December 31, 2015. Then according to the MOA, there's  
15 another CBA --

16 THE COURT: Right.

17 MS. SCHULMAN: -- effective January 1, 2016.

18 THE COURT: That's the one we are looking for.

19 MS. SCHULMAN: Right.

20 MR. DUSENBERRY: Right.

21 MR. SMITH: I am not sure, your Honor. I can look  
22 into that. If you want, I can send a letter.

23 THE COURT: I think it's relevant. I am not sure if  
24 it's dispositive, but I think it's relevant.

25 MR. SMITH: If you want, I'll send another --

H2dnorlc

1 THE COURT: I am not going to tell you you can't make  
2 the motion.

3 Do you think you want to make the motion beyond what  
4 you have already submitted, or do you want me to just deem this  
5 to be the motion?

6 MR. SMITH: I think we want a briefing schedule, your  
7 Honor.

8 THE COURT: OK. I think we've taken this about as far  
9 as I can go. I'm hungry for more authority. I haven't seen  
10 much.

11 When do you think you could make the motion,  
12 Mr. Smith?

13 MR. SMITH: Would four weeks be too long for the  
14 Court?

15 THE COURT: How long?

16 MR. SMITH: Would four weeks be too long for the  
17 Court's docket?

18 THE COURT: It is not too long for me. Of course, we  
19 do have a pending motion already. I guess this arbitrability  
20 question kind of trumps that, right?

21 If there is an enforceable arbitration clause, then  
22 the other motion kind of melts away, right?

23 So I think I have to resolve this one first, and only  
24 if I deny this motion do we then get to the other one.

25 Does anybody disagree with that?

H2dnorlc

1 MR. SMITH: No, your Honor.

2 THE COURT: Given the FAA, given the presumptions in  
3 favor of arbitration, I think if there is an enforceable  
4 arbitration provision, then that will require me to send this  
5 to the arbitrator without resolving the motion that's currently  
6 pending.

7 MS. SCHULMAN: We would like a shorter briefing  
8 schedule than four weeks in light of the pending summary  
9 judgment motion.

10 MR. DUSENBERRY: They have waited five months with a  
11 penning summary judgment motion, your Honor. Now they are  
12 making a motion for arbitration. Our plaintiffs --

13 THE COURT: In fairness, when did this agreement get  
14 written, this amendment?

15 MR. DUSENBERRY: December of '16.

16 THE COURT: Yes. So they haven't waited five months.  
17 As soon as it happened, they pretty shortly after that --

18 MR. DUSENBERRY: They did it a month later. You know,  
19 so, but our plaintiffs have already been waiting for a  
20 significant time for a decision, and, you know, I guess I would  
21 just say we bifurcated the proceedings in the beginning to  
22 speed resolution of the case. Now we're facing yet another  
23 delay here. And, you know, so I would just ask the Court,  
24 respectfully ask that the Court --

25 THE COURT: A shorter schedule is what you are saying?

H2dnorlc

1 MR. DUSENBERRY: Yes.

2 MR. SMITH: We have a tolling agreement in place.

3 THE COURT: Is there a concern that the defendants  
4 here are going to go belly up, or is there some concern as to  
5 whether they will be viable?

6 MS. SCHULMAN: As far as I know, there is not a  
7 concern about that, but we would just like to move the case  
8 along.

9 This issue has been pretty extensively briefed already  
10 in the letters. It doesn't seem like there should be too much  
11 more to do. I don't see why four weeks would be necessary.

12 THE COURT: What is the reason for four weeks?

13 Do you have some other obligations?

14 MR. SMITH: I asked for some time. I do have a trial  
15 starting on March 7 in Westchester Supreme. I shouldn't say  
16 it's actually starting, I'm scheduled. It could start on that  
17 day. Depending on how things go, I could be calling a jury  
18 that day. If I have to, whatever the Court finds --

19 THE COURT: I'm really looking to see if there is more  
20 authority that hasn't been cited, if there's additional  
21 authority. The issues are pretty well framed at this point.

22 I don't need a lot of sort of fancy language that just  
23 says what was already said pretty articulately in the letters.  
24 I just need to know whether there's some Second Circuit  
25 authority, some out-of-circuit authority, some Department of

H2dnorlc

1 Labor authority that suggests that the collective bargaining  
2 unit has the power to bind former employees to arbitrate, even  
3 though their employment predated the amendment that added an  
4 arbitration clause. I think that's pretty discrete.

5 Let's say three weeks. Three weeks from today is  
6 what? Today is the 13th. March 6.

7 How long to respond?

8 MS. SCHULMAN: I would normally ask for just the same  
9 amount of time, but I do have an arbitration the week of the  
10 20th, so if we could get maybe three weeks and two days or  
11 something like that.

12 THE COURT: How much?

13 MS. SCHULMAN: Maybe until the 29th or the 30th  
14 instead of until the 27th?

15 THE COURT: If we are going to accommodate your  
16 schedule, I think we ought to accommodate Mr. Smith's as well.

17 MS. SCHULMAN: We could stick with the 27th I guess.

18 MR. SMITH: I have no objection to giving them extra  
19 time, Judge, if that makes it easier for them.

20 THE COURT: What were you asking for?

21 MS. SCHULMAN: The 29th. It's two extra days.

22 THE COURT: All right. The 29th is fine.

23 Then a reply. I'll give you a week, Mr. Smith, if you  
24 want it, but don't feel you have to.

25 MR. SMITH: I think I need two weeks, Judge.

H2dnorlc

1 THE COURT: What's that?

2 MR. SMITH: I probably need two weeks. There are  
3 going to be two opposition papers.

4 THE COURT: Though usually I would give a week to ten  
5 days, I don't generally give two weeks. Again, I think this is  
6 pretty well briefed. I'm tempted to just say anyone who wants  
7 to send me supplemental authority can do it in three weeks and  
8 I'll just take what you get. I am not sure I need more than  
9 that.

10 MS. SCHULMAN: That would be fine with us.

11 MR. DUSENBERRY: That would be amenable to plaintiffs.

12 MR. SMITH: Ten days is fine.

13 THE COURT: Let's stick with that.

14 MR. SMITH: Judge, can we address pages limitations at  
15 this point? I don't know they are going to cross-move.

16 THE COURT: Cross-move for what? I assume they are  
17 opposing yours. I don't think there will be a cross-motion.

18 MR. SMITH: There's none. You're right. I apologize.

19 THE COURT: So, page limitations, I think 20 pages  
20 would be plenty at this point. Again, I'm not just looking for  
21 you to send me what you have already sent me and make it double  
22 spaced.

23 I just need you to tell me what other authority there  
24 is out there. Be discrete. You have other things to do. I  
25 get it. I think your papers did a good job of teeing up the

H2dnorlc

1 issue, just not resolving it to my satisfaction. That's really  
2 the issue. OK?

3 MR. SMITH: Thank you.

4 THE COURT: All right.

5 I guess the question is what do I do in the meantime  
6 with the pending motion. So I am going to stay that or deny it  
7 without prejudice to renewal depending on how this one goes. I  
8 have another case with the same issue. Is garbage good? Does  
9 it have value?

10 All right. I will decide on that one. I am not going  
11 to resolve that today.

12 Is there anything else we should chat about?

13 MS. SCHULMAN: No, your Honor.

14 THE COURT: No. OK.

15 MR. SMITH: I don't think the pending motion should be  
16 denied with leave to renew. I think, if anything, it should  
17 just be stayed. I am just putting my position on the --  
18 obviously it is up to you, Judge.

19 THE COURT: Yes. Otherwise, it's on my six-month  
20 list, and since I am now being told to stop that one and do  
21 another one, I don't see a downside to denying it. Then you  
22 can just renew it, and it will be right back where it was and  
23 then I will resolve it, because I'm pretty close to resolving  
24 it.

25 MR. SMITH: Without having to file any briefs or



H2dnorlc

1 anything?

2 THE COURT: Yes.

3 MR. SMITH: OK.

4 THE COURT: OK. Ms. Schulman?

5 MS. SCHULMAN: I have nothing else.

6 THE COURT: It is an interesting issue I think. But  
7 it may not be the best use of everybody's time. I am not sure.

8 Let me thank the court reporter, as always. If  
9 anybody needs a copy of the transcript, you can take it up with  
10 him either now or later through the website.

11 So, thanks.

12 (Adjourned)